IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL, JAMES GRIFFIN, Appellant, vs. R.L. PERSONS CONSTRUCTION, INC., AND UNITED STATES FIDELITY AND GUARANTEE COMPANY, Respondent.	)	Appeal No. SC87324 **ORAL ARGUMENT REQUESTED**

SUBSTITUTE APPELLANT'S REPLY BRIEF

On Appeal to the Missouri Supreme Court
From the Circuit Court, Division II, of Ripley County, Missouri

Honorable Mark L. Richardson, Judge

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REPLY

The advantage this Court has is that, with the additional briefing, eventually someone may figure out the problem. The error running throughout the Respondent's brief is its steadfast refusal to acknowledge that the relationship between the parties is one governed by contract. Parties to a contract certainly can agree to call a duck a dog and the scoundrel in breach of its solemn oath, the one who should be smote down and laid low with a pox upon his house is the party to the contract who would try and crawfish out of his agreement and

claim the ducks are naught but ducks. Ordinarily, the Appellant would reply to the Respondent's arguments *seriatum* but, with this recent revelation, the Appellant will tackle the Respondent's arguments out of order. In the interests of coherence, the Appellant will cite the location of the arguments in the *Respondent's Brief*, hereinafter "RBf".

The most troubling aspect of this case has always been the trespass statute. RBf 14-16. When one considers the contractual relationship between the parties, it becomes clear why the trespass statute is not analogous. To establish the prevailing wage, the State surveys the contractors by occupation type. RSMo § 290.262.1 (2000).[1] Any contractor who objects to the determined rates may file such objections and, if not satisfied with the agency determination, can pursue it through the courts. RSMo at §§ 290.262.2 to .7. Other interested parties may intervene in the court proceedings. RSMo § 290.262.8. Before any public body lets a contract, it must obtain the prevailing wage rates, do so at least ten days

[1] All citations are to RSMo (2000) unless otherwise noted.

beforehand, incorporate the prevailing wage rate in the resolution or ordinance letting the bid and insure the successful bidder understands it cannot pay less than the prevailing wage. RSMo §§ 290.250, .320, .325 and 8 C.S.R. 30-3.010(1)-(5). The public body must provide notice prior to the commencement of the work and thereafter collect and inspect the certified payroll records the contractor must keep. RSMo §§ 290.250, .290 and 8 C.S.R. 30-3.010(6) & (7). The entire concept is that State tax dollars expended for public works shall include a fair wage, as previously determined and subject to objection, and then follow through to make sure the wages paid are passed on to the laborers. RSMo §§ 290.220, .230, .300-.315 & .330-.340. A trespass is a wrongful act committed by one who forcibly interlopes on the property of another. It is an act committed by a stranger. If the trespass statute required obtaining a survey, agreeing with ones neighbor on the survey, executing a written agreement on the boundary, posting the survey line and then allowing treble damages for transgressions, it might have some bearing on the case at bar. It does not because this argument, as with all the

Respondent's arguments, suffers the same fatal flaw, they assume the Appellant's cause of action sounds in tort when, in fact, it is an action sounding in contract.

Early in the Respondent's brief, it cites a case that holds part of the contract provisions are a penalty and later in the brief it equates that provision with the portions of the contract the Appellant relies on. RBf 9 *citing Division of Labor Standards Dept. of Labor and Inds. Relations State of Mo. v. Walton Const. Management Co., Inc.*, 984 S.W.2d 152 (Mo.App. W.D. 1998), RBf 13 *comparing* RSMo §§ 290.250 and § 290.300. The Appellant does not dispute that § 290.250 is a penalty. The State is intimately involved in the contract provisions so they include what would be between private parties an unenforceable penalty. The penalty is well within the State's prerogative. Section 290.300 is an entirely different contract provision. Supposing this were a contract case between private parties and § 290.250 were found to be an unenforceable penalty provision, the solution would not be a rending of the entire agreement, the solution would be to

excise the offensive section and enforce the remainder of the contract provisions.

The distinction between § 290.250 and § 290.300 is the very basis of the distinction between unenforceable penalty provisions and liquidated damages clauses. To the contrary of the Respondent's argument that the intangibles are irrelevant, intangible damages are the distinction between penalties and liquidated damages. RBf 16; *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942)(*overruled* by statutory amendment on separate issue, s*ee Trans World Airlines v. Thurston*, 469 U.S. 111, ftnt 22 (1985). The entire test of liquidated damages turns on the intangible nature of the harm, as there must be intangible injuries not susceptible to proof to justify a liquidated damages clause and the clause must link the liquidated damages to the harm and be a reasonable estimate of the damages. *Overnight supra; Muhlhauser v. Muhlhauser*, 754 S.W.2d 2 (Mo.App. E.D. 1988). A court, the bastion of the common law, may well view legislative alterations to common law damages, like the trespass statutes, as officious intermeddling to be treated as a penalty. The case at bar

involves a contract for the expenditure of tax dollars and specifying the contract provisions is wholly within the legislature's prerogative. Thus, to the contrary of the Respondent's underlying premise, the provisions of the prevailing wage act should be viewed as nothing more or less than what they are, contract provisions.

The Respondent argues that the liquidated damages clause can cost the contractor more than the penalties, thus the liquidated damages must be penal. RBf 10. The Appellant cannot defendant the penalty clause in § 290.250. The penalty is what the statute says it is and, but for a party to the contract being the State, it is an unenforceable penalty. The $10.00 a day fine probably made a lot more sense in 1969 when pipe fitters and plumbers were making about $5.50 an hour. *Woodman Eng'g Co. v. Butler*, 442 S.W.2d 83, 85 (Mo.App. W.D. 1969). The sum is a penalty as it has no link to the wage scale of the underpaid workman. It is further disconnected from any harm, as it is not linked to the number of hours the underpaid workman labored on any given day. Thus, the disparity between the two statutes will not support

the inference drawn and simply highlights that § 290.250 is a penal provision.

The better inference is that, having provided a remedy to correct for the public harm in § 290.250, the contract clause in § 290.300 is a liquidated damages provision. The Respondent suggests this is not the case on the theory that, unlike § 290.527, § 290.300 does not use the term liquidated damages. RBf 13. The contract already has a penalty provision, § 290.250. It seems the better inference is that § 290.300 is a liquidated damages clause rather than a redundant penalty clause. As the harm suffered by the workman is real but intangible, it is the type of injury requiring a liquidated damages clause.[2] The damages are linked to the extent of the harm, the pay scale and the hours worked but underpaid. The measure seems reasonable for while it does allow recovering double the difference, such figure is the rate of pay for work on Sundays, holidays and

[2] The Appellant had trouble finding or maintaining employment after stirring up the current mess, which is the exact species of intangible injuries requiring liquidated damages. Tr 24-25.

hours over 10 per workday.[3] If a workman were paid nothing, the liability would be to pay the holiday rate and the closer the contractor is to the correct rate, the less burdensome he or she finds the liability. Section 290.300 is a classic liquidated damages clause. It does not contain those words and is unlike § 290.527 because the term would be redundant surplusage. The drafters of § 290.300 simply continued in the same train of thought that, having linked the damages to the maximum rate of pay, the suit "…brought to recover the same shall be deemed to be a suit for wages…". If it walks like a duck and sounds like a duck it is a duck, unless the parties contract to call it a dog.

The Respondent argues because the recovery of double the underpaid wages was created by statute and has no common law roots, it is a penalty. RBf 12-13. Here again, the argument falters on the distinction between tort and contract. If § 290.300 created an independent statutory tort, as for

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[3] The Appellant is assuming an eight hour workday and ignoring the crowd who works four ten-hour days.

example 42 U.S.C. § 1983 does, it might have merit. However, § 290.300 does not alter the measure of damages in an existing common law cause of action nor create a cause of action, it is a contract clause. It does not exist by statute alone. It only arises once an employment contract has come into existence and the workman performs labor on the public works project. For the same reason it has no common law roots, as its roots lie in contract law. *Banta v. Stamford Motor Co.*, 92 A. 665 (Conn. 1914)[4](damages of $15 per day for late delivery of yacht enforceable); *Muldoon v. Lynch*, 6 P. 417 (Ca. 1885)(forfeiture of $10 per day unenforceable as it was labeled a forfeiture); *Brewster v. Edgerly*, 13 N.H. 275 (N.H. 1842)(promise to pay $100 if the paper did not contain the proper method for making approved incorruptible teeth held recoverable). The question is whether § 290.300 is in the nature of a penalty clause or liquidated damages clause and the Appellant is certain it is the latter.

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[4] *Banta* was overruled on a procedural point. *Norwalk Door Closure Co. v. Eagle Lock and Screw Co.*, 220 A.2d 263 (Conn. 1966).

While the topic has turned to 19th century law, we can turn to the railroad rate cases cited by the Respondent. RBf 14. The first is a railroad rate case, which is naught but more officious intermeddling with a common law tort. *Young v. Kansas City, St. Joseph & Council Bluff R.R. Co.*, 33 Mo.App. 509 (Mo.App. W.D. 1889). At common law, a common carrier could only recover a reasonable charge, which law the legislature entirely supplanted. *Ibid.* The Respondent cites a district court ruling alleging it is from the Eighth Circuit, which is only mentioned so it may be dismissed while allowing the consideration of the Supreme Court decision the District Judge was attempting to apply. RBf 14 *citing Ratican v. Terminal R. Ass'n of St. Louis*, 114 Fed. 666 (C.C. E.D. Mo. 1902).[5] The Supreme Court decided a railroad tariff case where the plaintiff was alleging only favoritism to other shippers and was not based on a claim the rates the plaintiff paid were unreasonable. *Parsons v. Chicago & N. W. Ry. Co.*,

[5] The Respondent should have anticipated a case marked with the number of the beast would be bad.

167 U.S. 447, 454-55 (1897). The court used the example of a passenger paying a fair price to travel from Iowa to Chicago but filing suit because someone else on the train rode for free. *Ibid.* The court held that type of suit was a penalty. *Ibid.* The court held that type of suit was a penalty. *Ibid.* Such circumstances could never arise under Missouri's Prevailing Wage Act as it specifically provides the rates set are not the maximum, § 290.270, and the only party who can sue is a workman who has done work under the contract but who was paid less than the contract rates, § 290.300. One workman cannot bring suit just because another has been paid more than the prevailing wage. Further, when suit is brought by one harmed seeking a statutorily increased measure of damages, the Supreme Court nearly always finds it to be remedial or compensatory, as discussed on pages 33 to 35 of *Appellant's Substitute Brief*. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942)(the retention of a workman's pay…liquidated damages).

The Appellant will bring this soiree into the 19th century to an end. Some aspects of the law evolve over time. Some

things that were once acceptable become cruel and other things that would have been penal become the norm. *Roper v. Simmons*, 543 U.S. 551 (2005). At one time, legal counsel could be found to try a jury trial and prosecute an appeal over a $43.00 dispute. *Brewster v. Edgerly*, 13 N.H. 275, 1842 WL 2127 (N.H. 1842)(the $43 being the difference between the jury award and the contract price). It would not be that long after the *Brewster* opinion that a law allowing the recover of attorney's fees as against a vexatious insurer would come into existence. RSMo. § 375.420.[6] While that law would, from time to time, be described as highly penal, the courts never treated it as a true penalty. *Jones v. Prudential Ins. Co.,* 155 S.W. 1106, 1110 (Mo.App. E.D. 1913). This was apparently true even when the attorney's fees award exceeded the face value of the life insurance policy at issue. *Buchholz v. Metroplitan Life*

[6] WestLaw's publication, V.A.M.S. has the full derivation of the statute but by encouraging everyone to turn to computer assisted research and throw out their law books, it is now, short of a drive to St. Louis, impossible to tell you what any law prior to 1991 states.

Ins. Co., 160 S.W. 573 (Mo.App. E.D. 1913)(jury award of $100.00 in attorney's fees not grounds for reversal). Now, nearly a century after those cases, it is difficult to imagine anyone suggesting that a contract clause specifying or shifting the burden for attorney's fees is an unenforceable penalty or in the nature of a penalty.

Having returned to the present, the Respondent argues the Appellant's suit is not an action on a bond. RBf 16. The Respondent cites no authority so the Appellant is at a loss to know what fairy dust he has failed to sprinkle around. He does note that he has relied heavily on a case styled *Miner v. Howard*, 67 S.W. 692 (Mo.App. W.D. 1902). The *Miner* court had no trouble recognizing that a suit by a materialman was an action on a bond. This Honorable Court's attention is invited to the caption of the Appellant's suit providing notice he has brought this suit at the relation of the State of Missouri. The cause has been so captioned because this is what § 522.300 calls for. Having entered into a contract and securing their obligations with a bond, then pursuant to the

terms of the contract, the duck, the action on contract, is now called a dog, an action on the bond.

If the Appellant could have ended his *Reply* on that note, he would have. Unfortunately, the Respondent has advanced several arguments that did not fit within the tort verses contract construct. The Respondent advances the position a penalty must include more than obligations to the State or § 516.400 would have to be disregarded. RBf 11. The first problem is the statute really does mean payments to the State as it encompasses causes of action that can commenced by complaint, information or indictment. RSMo § 516.410. Likewise, it seems it would be unconstitutional to create a cause of action within the meaning of § 516.380 or § 516.400, as penalties must be distributed to schools. Mo. Const. Art. 9, § 7; *Missouri Gaming Comn. v. Missouri Veteran's Comm.*, 951 S.W.2d 611 (Mo. 1997). As this problem has bedeviled the courts since John Marshall was the Chief Justice, it is beyond the Appellant's powers or obligation to resolve it. The Appellant would observe it need not resolved, if the court views

the suit as arising from the Appellant's employment contract and treat the issues as contract law questions.

The Respondent persists in its claim that the specific trumps the general, thus the prevailing wage claim trumps the bond action. RBf 17. There are half a dozen theories bundled in the statement. There is no such thing as a garden variety suit on a bond. As bonds secure existing obligations, they are ancillary to the primary obligation. Indeed, the term bond rarely appears alone and is usually preceded by the nature of the obligation, such as an appearance bond or payment, performance, *supersedeas etc.* Regardless of the obligation secured, once the parties contract and require a bond, the statute of limitations is ten years. *Miner v. Howard*, 67 S.W. 692 (Mo.App. W.D. 1902). As among the statute of limitations, they have always been read in *pari materia,* with causes of actions and pleadings generally construed to reach the merits. *See Schwartz v. Mills*, 685 S.W.2d 956 (Mo.App. E.D. 1985); *Campbell v. Anderson*, 866 S.W.2d 139 (Mo.App. W.D. 1993)(construing petitions as pleading temporary nuisances and not time barred permanent nuisances). The Appellant has

pled an action on a contract. It might have been his parole employment contract with Gaylon Griffin. It might be as a third party beneficiary to the written prime contract, which contract includes his wage rate. It really does not matter much as the obligation is secured by a bond, which has a ten year statute of limitations. RSMo § 516.110. The fact that the contract includes a liquidated damages clause does not change the nature of the contract or the limitation period. In the Show-Me State, if the parties reduce their agreement to writing then the party paying has five years to sue for nonperformance and the performing party gets an extra five years, i.e. ten years, to sue for nonpayment.

The last theory raised by the Respondent and the next to last one herein is the claim the Appellant could have sued for his wages alone. RBf 17-18. This theory raises a host of issues the Appellant will not attempt to handle. At its core, the issue is whether parties to a contract who have gone to the trouble to specify the liquidated damages in the event of specific types of breach could then plead a cause on the contract and ignore the liquidated damages clause. As it is

now clear the Respondent has little regard for its contractual obligations, it is obvious why it might advance such a proposition. The Appellant is of the opinion that, having executed a contract specifying the liquidated damages, one is bound by the contract. *See Parsons v. Chicago & N. W. Ry. Co.*, 167 U.S. 447, 454-55 (1897)(wherein the plaintiff, who had suffered no actual harm tried to do just that as compared with the case at bar wherein the plaintiff was paid one-third the contract wage rate).

The Appellant will end where the Respondent began with *Laszewski*. The Appellant has yet to figure-out what the legal effect is when an appellate court assumes a trial court has correctly decided an issue of law. *State ex rel. Laszewski v. R.L. Persons Const.*, 136 S.W.3d 863 (Mo.App. S.D. 2004). Appellate courts review issues of law *de novo*. Thus, *Laszewski* is exactly what it looks like, an advisory opinion. Having now been sent begging around looking for some advice more to counsel's liking, he has almost sworn them off. Before turning to Point II, the Appellant will close with one last thought, contract.

REPLY - POINT II

The first sentence of the *Respondent's Brief* "The prevailing wage statute is a penalty statute.", and its proposition in Point II, the General Assembly wanted a three year limitation period, are untenable opposites. As § 516.130 was amended after *Laszewski*, the only proper inference is they wanted the law read as anything except a penal statute. As the Respondent has been gracious enough to forego any serious argument the amended statute applies retroactively, the Appellant will assume the point is moot. Keeping in mind the lesson from *Laszewski*, the Appellant will leave for another day considerations of the legislature's strange use of the word under and issues of *sub silento* amendments. A suit for wages thus far remains a suit for wages, an action on an employment contract. RSMo § 290.300.

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CERTIFICATE OF SERVICE

COMES NOW Appellant, by and through counsel, John M. Albright of MOORE AND WALSH, L.L.P., and certifies that the Brief complies with the limits in Rule 84.06(b) insofar as it is Appellant's Brief with less than 31,000 words or a Respondent's Brief with less than 27,000 words or as a Reply Brief with less than 7,750 words in that it is Appellant's Reply Brief and contains 3,340 words and that a copy of the same, together with a copy on disk in Word format scanned for viruses, was served upon the attorneys of record by United States mail, postage prepaid, addressed to: Ralph Innes, Esq.,

P.O. Box 1049, Poplar Bluff, MO 63902 on this 2nd day of May, 2006.

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